FBT-CV15-6048103-S

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO et al.	:	SUPERIOR COURT
	:	JUDICIAL DISTRICT OF
Plaintiffs,	:	FAIRFIELD
	:	
v.	:	AT BRIDGEPORT
	:	
BUSHMASTER FIREARMS INTERNATIONAL, LLC, et al.	:	FEBRUARY 16, 2016
Defendants.	:	

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS CAMFOUR, INC.'S AND CAMFOUR HOLDING, INC.'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

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Defendants Camfour, Inc. and Camfour Holding, Inc. s/h/a Camfour Holding, LLP a/k/a Camfour Holding, Inc. (collectively referred to as "Camfour") respectfully submit this reply memorandum of law in further support of their motion to dismiss plaintiffs' First Amended Complaint pursuant to Practice Book § 10-31(a)(1) and the Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901, *et seq.* ("PLCAA").

I. SUMMARY OF THE ARGUMENT

Plaintiffs do not dispute that their claims against Camfour constitute a "civil action . . . against a seller . . . of [a firearm that has been shipped or transported in interstate commerce] . . . for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief resulting from the criminal or unlawful misuse of [the firearm] by . . . a third party," 15 U.S.C. § 7903(5)(A). Accordingly, the only issue in dispute is whether plaintiffs' claims against Camfour fall within two narrow exceptions to the PLCAA: (1) negligent entrustment; or (2) the predicate exception — *i.e.*, an action arising from the knowing violation of a state or federal statute applicable to the sale or marketing of firearms that was a proximate cause of the harm for which relief is sought. 15 U.S.C. §§ 7903(5)(A)(ii) & (iii). There is no support for plaintiffs' position that their claims against Camfour satisfy either of these exceptions. The negligent entrustment exception does not apply because Camfour did not supply the Bushmaster Rifle to the person who used it in a manner involving unreasonable risk of physical injury to the others. CUTPA does not satisfy the requirements for the predicate exception because it is not applicable to the sale and marketing of firearms. To accept plaintiffs' arguments would be to

entirely negate the statutory immunity that Congress provided to firearms manufacturers and sellers when it enacted the PLCAA.

There is a reason why only one other similar case[1] has been filed against a federally licensed firearms manufacturer or wholesale firearms distributor seeking damages resulting from the criminal use of a firearm by a third party since the PLCAA was enacted more than a decade ago. That is because the PLCAA categorically bars such claims and there is no good faith argument that can be made to the contrary. The factual basis of that one other case, *Jeffries v. District of Columbia*, is similar to plaintiffs' allegations here, and involved claims against ROMARM, the manufacturer of an "AK-47 assault rifle" that was used to fire indiscriminately into a crowd of mourners gathered at a funeral. 16 F. Supp. 2d 42, 43 (D.D.C. 2013).

The court in the *Jeffries* case, acting *sua sponte*, dismissed the claims against the manufacturer of the "AK-47 assault rifle" with prejudice and without ROMARM even having entered an appearance, holding that the "law is very clear: The Protection of Lawful Commerce in Arms Act . . . explicitly bars this kind of suit." 16 F. Supp. 2d at 43. The court continued to explain that the "PLCAA unequivocally bars plaintiff's claims against ROMARM [because it] is uncontroverted that a third party discharged the assault rifle during the commission of a criminal act. The PLCAA explicitly and clearly prohibits this kind of suit." *Id.* at 46 ("The Court finds that

[1] A case in which the manufacturer or distributor had lawfully sold the firearm to a federally licensed firearms dealer who, in turn, lawfully sold it to a consumer, where the firearm was later criminally used by a third party.

the law here is so clear that it is appropriate to dismiss the claims against ROMARM *sua sponte*, and with prejudice.").

Nothing about the present case distinguishes plaintiff's claims against Camfour based on its sale of the Bushmaster Rifle from Jeffries's claims against ROMARM based on its sale of an "AK-47 assault rifle." Both cases involve the same general type of firearm and both cases involve defendants that are not alleged to have done anything wrong other than lawfully selling those firearms to the civilian market. As the U.S. District Court for the District of Columbia held, "Plaintiff wants to sue ROMARM because it manufactured the assault rifle used in her daughter's murder. Congress, through the Protection of Lawful Commerce in Arms Act has explicitly and unequivocally prohibited this kind of suit." In the present case, plaintiffs want to sue Camfour because it lawfully sold at wholesale the Bushmaster Rifle used by Adam Lanza to intentionally shoot and injure Natalie Hammond and murder the other plaintiffs' decedents. Plaintiffs' claims are "explicitly and unequivocally prohibited" by the PLCAA.

II. ARGUMENT

The exceptions to the PLCAA do not create a private cause of action or remedy. 15 U.S.C. § 7903(5)(C); *Philips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216, 1225 (D. Colo. 2015); *Bannerman v. Mountain State Pawn, Inc.*, No. 3:10-CV-46, 2010 WL 9103469, at *9 (N.D.W.V. Nov. 5, 2010). Accordingly, for plaintiffs' claims to fall within an exception to the PLCAA they must both: (1) meet the requirements for the exception set forth in the PLCAA; and (2) state a valid cause of action pursuant to Connecticut law. Plaintiffs' claims against Camfour fail on both counts.

A. PLCAA Immunity is Properly Raised Through a Motion to Dismiss

Plaintiffs' claim that Camfour's motion to dismiss should be treated as a motion to strike has no legal merit because a valid state law claim is a requirement to satisfy the exceptions to the PLCAA. The only Connecticut court to have previously addressed the issue held that the PLCAA implicates the court's subject matter jurisdiction and is properly decided on a motion to dismiss. *Gilland v. Sportsmen's Outpost, Inc.*, No. X04CV095032765S, 2011 WL 2479693, at *2-*17 (Conn. Super. May 26, 2011). That same court rejected plaintiffs' arguments that the decision in *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114 (2d Cir. 2011), bore any relevance to the issue because it concerned the subject matter jurisdiction of federal district courts, which unlike the Connecticut Superior Court, are courts of limited jurisdiction, and federal law does not consider statutory immunity from suit to affect the subject matter jurisdiction of a U.S. District Court. *Gilland*, 2011 WL 4509540, at *5-*6 (Conn. Super. Sept. 15, 2011). Connecticut law, however, holds that statutory immunity from suit is properly raised through a motion to dismiss for lack of subject matter jurisdiction.

The basis of Camfour's argument is that this Court lacks subject matter jurisdiction over the class of cases to which this case belongs — *i.e.*, a qualified civil liability action under the PLCAA. Although defendants filed a motion to dismiss and/or strike in the *Gilland* case, the PLCAA was raised solely pursuant to the motion to dismiss; the motion strike addressed the legal sufficiency of certain claims and was never addressed by the court. 2011 WL 2479693, at *1, * 24. Although plaintiffs claim that the *Gilland* court "permitted plaintiffs to amend their complaint multiple times," Opp'n at 12 n.3, the decision shows that the court did not do so, rather defendants

did not object to the requests to amend, so they were deemed automatically granted, without any action by the court. 2011 WL 4509540, at *1. Once defendants filed an objection to the request and the issue was brought before the court, it declined to rule on plaintiffs' request to amend before determining whether it had subject matter jurisdiction. *Id.*

B. Plaintiffs' Claims Against Camfour Do Not Meet the Negligent Entrustment Exception to the PLCAA

The PLCAA only allows an otherwise prohibited claim to proceed based on the negligent entrustment exception if a seller supplied a firearm "for use by another person when the seller knows, or reasonably should know, the person to whom the [firearm] is supplied is likely to, and does, use the [firearm] in a manner involving unreasonable risk of physical injury to the person or others." *Id.* § 7903(5)(B).[2]

The negligent entrustment exception to the PLCAA only applies when the firearm is used "in a manner involving unreasonable risk of physical injury to the person or others," a definition that necessarily excludes the lawful sale of a legal firearm from a federally licensed wholesale distributor to a federally licensed retail dealer. Opp'n at 30 (conceding that the lawfulness of the sale is undisputed). Plaintiffs mistakenly claim that Camfour cited only the *Williams v. Beemiller, Inc.* decision[3] holding that the negligent entrustment exception to the PLCAA does not encompass

[2] The negligent entrustment exception to the PLCAA only applies when the person to whom the seller directly supplied the firearm is the one who actually uses it in a manner involving unreasonable risk of physical injury to himself or another, not subsequent parties to whom the firearm may later be entrusted. *See* 151 Cong. Rec. S9229. As discussed in Section II.C., this prohibition on liability based on successive entrustments is consistent with Connecticut law.

[3] *Williams v. Beemiller, Inc.*, No. 7056/2005, at *15 (N.Y. Sup. Ct. Erie Cnty. Apr. 25, 2011). Contrary to plaintiffs' implication, this holding was not reversed. Although the decision was

the sale of a firearm from a wholesale distributor to a retail dealer, where the retail dealer is not the ultimate shooter. Opp'n at 24 n.15. Plaintiffs are incorrect. In its motion to dismiss Camfour also discussed in detail a prior decision by the Connecticut Superior Court in which it granted defendants' motion to dismiss pursuant to the PLCAA, holding that the negligent entrustment exception did not apply because defendants had not supplied the handgun to the shooter for his use, based on the allegations in the complaint that they gave it to him to inspect in the store as a prospective purchaser and he then took it without permission when he was left alone with it. *Gilland*, 2011 WL 2479693, at *12-*13. The holdings of the *Williams* and *Gilland* courts are in accord with the provision in the PLCAA providing that the negligent entrustment exception applies only to sellers and not manufacturers.[4]

Given the lack of any support for their negligent entrustment claim based on the language

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reversed on appeal, it was on different grounds, and the appellate court did not address the negligent entrustment exception to the PLCAA. 952 N.Y.S.2d 333, 339 (App. Div. 4th Dep't 2012). All that the court in the *Norberg v. Badger Guns, Inc.* case (attached as Exhibit A to Pls.' Opp'n) held with regard to negligent entrustment in its January 30, 2014 oral ruling is that it "does not believe that congress [*sic*] used the word, use, to mean exclusively discharge as the defendant suggests," but that could also include "brandishing a gun in a public place. . . ." *Id.* at 21. Further, the *Norberg* case involved the alleged illegal sale of a firearm to a straw purchaser by a retail dealer. Based on the straw purchase allegations in the *Norberg* case, the retail dealer supplied the firearm to the person who actually used it to shoot plaintiffs, but another person simply filled out the paper work. Simply stated, the *Norberg* decision provides no support for plaintiffs' negligent entrustment claim against Camfour.

[4] Although the legislative history to the PLCAA indicates that the negligent entrustment exception is intended to apply only to retail dealers who sell firearms directly to the ultimate consumer, and not wholesale distributors who sell firearms to retail dealers for purposes of wholesale, *see, e.g.*, 151 Cong. Rec. S9071, 151 Cong. Rec. S9374, the operative provision of the negligent entrustment exception simply refers to "sellers," 15 U.S.C. § 7903(6)(B), a term that encompasses both wholesale distributors and retail dealers, 18 U.S.C. § 921(a)(11)(A).

of the PLCAA itself, plaintiffs instead rely on a Supreme Court decision, *Smith v. United States*, that had interpreted use of a firearm in the context of an unrelated statute. 508 U.S. 223, 237 (1993). In *Smith*, the Supreme Court addressed a previous version of 18 U.S.C. § 924(c)(1), which imposed specific penalties if a criminal defendant "during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm. . . ." In *Smith*, the Supreme Court held that by bartering a firearm for drugs, the defendant "used" a firearm in relation to a drug trafficking crime for purposes of 18 U.S.C. § 924(c)(1). Bartering (exchanging or trading) a firearm for drugs fits within the definition of using a firearm within 18 U.S.C. § 924(c)(1) because the defendant used the firearm to obtain the drugs — *i.e.*, without the firearm, he would not have been able to obtain the drugs. Bartering a firearm for drugs is logically related to a sentencing enhancement for using a firearm in connection with a drug trafficking crime. Lawfully selling a legal firearm to a federally licensed retail dealer for purposes of resale, however, bears not no relation to using a firearm in a manner involving unreasonable risk of physical injury to the person or others for purposes of the PLCAA.

Despite the inapplicability of the decision in *Smith* to their novel argument regarding the use of a firearm for purposes of the PLCAA, subsequent to its decision in *Smith*, the Supreme Court unanimously held that the term "use of a firearm" applies only to the "active employment of the firearm." *Bailey v. United States*, 516 U.S. 137, 144-51 (1995). *Bailey* also involved an interpretation of a previous version of 18 U.S.C. § 924(c)(1), which imposed specific penalties if a criminal defendant "during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm. . . ." Through *Bailey*, the Supreme Court overruled its prior decision

in *Smith*, in which it had interpreted the "use of a firearm" in a drug trafficking crime for purposes of 18 U.S.C. § 924(c)(1). *See United States v. Regans*, 125 F.3d 685, 686 n.2 (8th Cir. 1997) (recognizing that *Bailey* overruled *Smith's* interpretation of "use" in 18 U.S.C. § 924(c)(1)). Based on the Supreme Court's decision in *Bailey*, the sale of a firearm between a wholesale distributor and retail dealer, like the storage of a firearm, does not constitute the "use" of a firearm.

In their original Complaint, plaintiffs alleged that Adam Lanza obtained the Bushmaster Rifle by "retrieving" it from an unlocked closet in the house he shared with his mother. Compl. ¶ 154.[5] The Supreme Court has specifically rejected an argument that storing a firearm constitutes "use" of a firearm, noting that the phrase:

> "I use a gun to protect my house, but I've never had to use it"—shows that "use" takes on different meanings depending on context. In the first phrase of the example, "use" refers to an ongoing, inactive function fulfilled by a firearm. It is this sense of "use" that underlies the Government's contention that "placement for protection"—i.e., placement of a firearm to provide a sense of security or to embolden—constitutes a "use." It follows, according to this argument, that a gun placed in a closet is "used," because its mere presence emboldens or protects its owner. We disagree. Under this reading, mere possession of a firearm by a drug offender, at or near the site of a drug crime or its proceeds or paraphernalia, is a "use" by the offender, because its availability for intimidation, attack, or defense would always, presumably, embolden or comfort the offender. But the inert presence of a firearm, without more, is not enough to trigger § 924(c)(1). Perhaps the nonactive nature of this asserted "use" is clearer if a synonym is used: storage. A defendant cannot be charged under § 924(c)(1) merely for storing a weapon near drugs or drug proceeds. Storage of a firearm, without its more active employment, is not reasonably distinguishable from possession.

[5] In their Amended Complaint, Plaintiffs tellingly omitted the fact that Nancy Lanza had been storing the Bushmaster Rifle in a closet and simply alleged that Adam Lanza "retrieved" it. Am. Compl. ¶ 187.

Bailey, 516 U.S. at 148-49 (emphasis added).

The Supreme Court further held that it is important to "consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme. The meaning of statutory language, plain or not, depends on context." *Bailey*, 516 U.S. at 145 (citations and punctuation omitted). Camfour's lawful sale of the Bushmaster Rifle to Riverview for purposes of resale, and Riverview's subsequent lawful sale of the Bushmaster Rifle to Nancy Lanza, cannot be considered the "use" of the Bushmaster Rifle by Riverview[6] "in a manner involving unreasonable risk of physical injury to the person or others," 15 U.S.C. § 7903(5)(B), without violating the very purpose for which the PLCAA was enacted. Accordingly, for purposes of the PLCAA, the negligent entrustment exception only applies when the factual allegations, as opposed to legal conclusions, in a complaint demonstrate that the seller of the firearm: (1) knew, or reasonably should have known that the person to whom it directly sold the firearm is likely to use the firearm in a manner involving unreasonable risk of physical injury to the person or others; and (2) the person who directly received the firearm from the seller actually does use it in a manner involving unreasonable risk of physical injury to himself or others. Based on the purpose of the word "use" in the statutory scheme of the PLCAA, there is no good faith basis to argue that the requirements for the negligent entrustment exception are satisfied by the lawful sale of a legal firearm by a federally licensed

[6] Similarly, based on the allegations in the Amended Complaint, Nancy Lanza did not use the Bushmaster Rifle "in a manner involving unreasonable risk of physical injury to the person or others," 15 U.S.C. § 7903(5)(B), because she was storing it in a closet, *Bailey*, 516 U.S. at 148-49. The only person who actually used the Bushmaster Rifle in a "in a manner involving unreasonable risk of physical injury to the person or others" was Adam Lanza on December 14, 2012.

wholesale distributor, to a federally licensed retail dealer for purposes of lawful resale. *Bailey*, 516 U.S. at 145. Accordingly, plaintiffs' claims do not fall within the negligent entrustment exception to the PLCAA.

C. Camfour Did Not Supply the Bushmaster Rifle to the Person Who Used it to Harm Plaintiffs

In addition to failing to satisfy the requirements for the negligent entrustment exception to the PLCAA, the factual allegations in the Amended Complaint demonstrate that plaintiffs do not have a valid negligent entrustment claim against Camfour based on applicable Connecticut law because Camfour supplied the Bushmaster Rifle to Riverview, and it was Adam Lanza who used it to cause harm to plaintiffs.

Pursuant to Connecticut law, liability for negligent entrustment requires that the defendant provide the chattel for the use of another "when he knows or ought reasonably to know that the one to whom he entrusts it is so incompetent to operate it, by reason of inexperience or other cause, that the owner ought reasonably to anticipate the likelihood that in its operation injury will be done to others." *Greeley v Cunningham*, 116 Conn. 515, 165 A. 678, 679 (1933) (emphasis added) (addressing the alleged negligent entrustment of an automobile).[7] A "principle feature of a cause

[7] Plaintiffs falsely suggest that the Connecticut Supreme Court in *Greeley* distinguished automobiles from firearms and explosives, suggesting that firearms are treated in the same manner as explosives. Opp'n at 15 n.4. The Connecticut Supreme Court actually distinguished automobiles from "ferocious animals or high explosives," both of which are considered to be "an intrinsically dangerous instrumentality," *Greeley*, 165 A.2d at 679, subject to absolute liability for any resulting damages. *Vendrella v. Astriab Family Ltd. Partnership*, 311 Conn. 301, 314, 87 A.3d 546, 553 (2014) (ferocious animals); *Green v. Ensign-Bickford Co.*, 25 Conn. App. 479, 482-84, 595 A.2d 1383, 1386 (1991) (explosives). There is similarly no support for plaintiffs' claim that "civilians" can constitute a "class of persons," such as children or intoxicated persons for

of action for negligent entrustment is the knowledge of the entrustor with respect to the dangerous propensities and incompetency of the entrustee." *Johnson v. Amaker*, No. CV075013242S, 2008 WL 441842, at *3 (Conn. Super. Jan. 29, 2008).

The Connecticut's Supreme Court's requirements for a negligent entrustment claim as set forth in the *Greeley* decision are similar to the requirements described in Section 390 of the Restatement (Second) of Torts. *Angione v. Bloom*, No. FSTCV085006850S, 2011 WL 5223043, at *8 (Conn. Super. Oct. 6, 2011). Section 390 provides that:

> One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

Restatement (Second) of Torts § 390. As explained in the *Johnson* decision, Comment b to Section 390 states that it is a special application of Section 308, which provides that:

> It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.

Restatement (Second) of Torts § 308 (emphasis added). Comment a to Section 308 explains that the "words 'under the control of the actor' are used to indicate that the third person is entitled to

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purposes of negligent entrustment. Opp'n at 15 n.5. In any event, plaintiffs concede that Camfour sold the Bushmaster Rifle to a federally licensed firearms dealer, who is certainly competent to possess it. Am. Comp. ¶¶ 31-36, 178. Accordingly, even accepting their patently frivolous argument about negligently entrusting legal firearms to civilians who are legally entitled to own them under federal and state law, plaintiffs' negligent entrustment claim against Camfour fails because it did not sell the Bushmaster Rifle to a "civilian," but rather to a federally licensed firearms dealer.

possess or use the thing or engage in the activity only by the consent of the actor, and that the actor has reason to believe that by withholding consent he can prevent the third person from using the thing or engaging in the activity." Restatement (Second) of Torts § 308, cmt. a.

Plaintiffs incorrectly claim that "the person to whom the chattel is entrusted need *not* be the person who later employs it to cause physical harm. That is a claim for negligent entrustment can involve successive entrustments so long as they are reasonably foreseeable." Opp'n at 28-29 (emphasis in original). In support of this contention, plaintiffs cite only cases interpreting Arkansas, Georgia and New York law, Opp'n at 29-30; the reason for that is that Connecticut law, which is applicable to their claims, forecloses their negligent entrustment claims against Camfour. Pursuant to Connecticut law, a defendant can only be held liable for negligent entrustment if the actions of the person to which the chattel was entrusted directly causes the injury to plaintiff. *Greeley*, 165 A. at 680;[8] *Mesner v. Cheap Auto Rental*, No. CV075009039S, 2008 WL 590495, at *4 (Conn. Super. Feb. 13, 2008) ("Connecticut law is clear that liability can only be imposed if the defendant entrusts the vehicle to the driver."); *Johnson*, 2008 WL 441842, at *4 (holding that negligent entrustment liability only arises if the defendant directly entrusts the product to the person who uses it to harm plaintiff); *Bryda v. McLeod*, No. CV030285188S, 2004 WL 1786822, at *2 (Conn. Super. July 12, 2004).

[8] "When the evidence proves that the owner of an automobile knows or ought reasonably to know that one to whom he entrusts it is so incompetent to operate it upon the highways that the former ought reasonably to anticipate the likelihood of injury to others by reason of that incompetence, and such incompetence does result in such injury, a basis of recovery by the person injured is established." *Greeley*, 165 A. at 680 (emphasis added).

Based on the allegations in the First Amended Complaint, Camfour sold the Bushmaster Rifle to Riverview, but it was Adam Lanza, who was two steps removed from Riverview, who used it to cause harm to them. Accordingly, plaintiffs do not have a valid negligent entrustment claim pursuant to Connecticut law.

D. CUTPA is Not a Statute Applicable to the Sale or Marketing of Firearms and Cannot Serve as a Predicate Statute for Purposes of the PLCAA Exception

The only other exception to the definition of a qualified civil liability action in the PLCAA upon which plaintiffs rely is "an action in which a . . . seller of a [firearm or ammunition] knowingly violated a State or Federal statute applicable to the sale or marketing of [firearms or ammunition], and the violation was a proximate cause of the harm for which relief is sought. . . ." 15 U.S.C. § 7903(5)(A)(iii) ("predicate exception"). The only statute that plaintiffs allege Camfour violated is CUTPA,[9] a civil statute that simply states that "[n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." C.G.S. § 42-110b(a).

[9] In their Opposition, plaintiffs made a telling admission regarding why CUTPA cannot be considered a predicate statute for purposes of the PLCAA "Congress envisioned negligent entrustment as a claim arising from legal firearm sales. The provision immediately following the negligent entrustment provision preserves 'an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product[.]'" 15 U.S.C. § 7903(5)(A)(iii). In other words, there is an entirely separate provision under PLCAA for causes of action arising from the illegal sale of a firearm. Opp'n at 31 (emphasis added). Plaintiffs' reference to the predicate exception as only applying to a cause of action arising from the illegal sale of a firearm is consistent with the PLCAA, which gives as examples of predicate statutes solely provisions in the federal criminal law related to the sale of firearms. 15 U.S.C. §§ 7903(5)(A)(iii)(1) & (II).

In their Opposition, plaintiffs focus solely on attempting to stretch CUTPA into a statute applicable to the sale or marketing of firearms, *id.* at 34-39, and in doing so fail to address the other two requirements for the predicate exception to apply to their claims against Camfour: (1) that Camfour knowing violated CUTPA; and (2) that such alleged violation was a proximate cause of the harm for which relief is sought. 15 U.S.C. § 7903(5)(A)(iii). Plaintiffs make no effort to attempt to explain how Camfour could have knowingly "engag[ed] in unfair methods of competition and unfair or deceptive acts or practices," by lawfully selling a legal firearm to a federally licensed firearms dealer. Nor can they fashion an explanation for how an alleged violation of a statute prohibiting "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce" could be a proximate cause of Adam Lanza's criminal acts of December 14, 2012, in which he intentionally shot Natalie Hammond and murdered the other plaintiffs' decedents.

In addition to the above two reasons, each of which independently preclude plaintiffs' claims against Camfour from satisfying the predicate exception to the PLCAA, the simple fact is that CUTPA is not a statute applicable to the sale or marketing of firearms. The U.S. District Court for the Central District of California succinctly explained why statutes of general applicability that do not actually regulate the firearms industry cannot serve as a predicate statute for purposes of the PLCAA:

> construing the word "applicable" in the predicate exception to mean "capable of being applied" would undermine not only the PLCAA's over-arching purpose, but also other specific statutory provisions of the PLCAA. Indeed, such an interpretation invites creative attorneys to develop novel theories under existing State and Federal statutes of general applicability to hold firearms manufacturers

> and dealers liable for the actions of third parties using "qualified" products. This result, however, flies in the face of Congress's stated disdain for applying such novel theories of liability against the firearms industry:
>
> > Congress finds [that] ... [t]he liability actions commenced or contemplated by the Federal Government, States, municipalities, and private interest groups and others are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law. The possible sustaining of these actions by a maverick judicial officer or petit jury would expand civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States. Such an expansion of liability would constitute a deprivation of the rights, privileges, and immunities guaranteed to a citizen of the United States under the Fourteenth Amendment to the United States Constitution.
>
> 15 U.S.C. § 7901(a)(7). This language forecloses any argument suggesting that Congress intended any provision of the PLCAA to allow, let alone encourage, the development of novel theories of liability based on violations of generally applicable State and Federal statutes. But this is precisely the result that would occur if the Court applies a literal interpretation of the word "applicable" to the predicate exception.

Ileto v. Glock, Inc., 421 F.Supp.2d 1274, 1290 (C.D. Cal. 2006), *aff'd*, 565 F.3d 1126, 1136 (9th Cir. 2009) (holding that the predicate exception only applies to "statutes that regulate manufacturing, importing, selling, marketing, and using firearms or that regulate the firearms industry").

In *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 403 (2d Cir. 2008), the Second Circuit Court of Appeals also held that the "predicate exception was meant to apply only to statutes

that actually regulate the firearms industry."[10] In a feeble attempt to argue that CUTPA is applicable to the sale and marketing of firearms, plaintiffs rely entirely on *dicta* from the Second Circuit's decision in *Beretta*. Opp'n at 36-39. The actual holding from the summary paragraph of the *Beretta* decision was that "the exception created by 15 U.S.C. § 7903(5)(A)(iii) . . . does not encompass New York Penal Law § 240.45" because it does not actually regulate the firearms industry." 524 F.3d at 404. Its continued statement regarding the general types of statutes that would be encompassed within Section 7903(5)(A)(iii) was not necessary to its resolution of the case and is therefore *dicta* that is not even binding on district courts in the Second Circuit.

Even based on the Second Circuit's *dicta*, plaintiffs' CUTPA claims would not satisfy the PLCAA's predicate exception. Plaintiffs concede that CUTPA does not does not expressly regulate firearms, but claim that it "has been applied to the sale and marketing of firearms" and "clearly implicates and is applicable to the sale and marketing of firearms." Opp'n at 37. They are incorrect. The one and only case that plaintiffs cite for both of these propositions, *Salomonson v. Billistics, Inc*., No. CV-88-508292, 1991 WL 204385 (Conn. Super. Sept. 27, 1991), is not related to the sale and marketing of firearms in general, which is the applicable criteria for purposes of the predicate exception to the PLCAA. Rather *Salomonson* involved a typical commercial transaction involving unfair or deceptive acts or practices that just happened to be between a

[10] "Interpreting the word 'applicable' in the predicate exception to mean any State or Federal statute 'capable of being applied' to the sale or marketing of firearms . . . create an exception so large that it would effectively render the entire PLCAA meaningless." *Ileto*, 421 F.Supp.2d at 1290.

firearm owner and company with which he had contracted to have gunsmithing services performed. *Id.*

Plaintiffs' attempt to bring their claims against Camfour based on its lawful sale of a legal firearm to a federally licensed firearms dealer, and the criminal misuse of that firearm more than two and a half years later, within CUTPA is exactly what the district court warned against in *Ileto*: a novel theory by a creative attorney seeking to circumvent the clear purpose of the PLCAA by relying on a statute of general applicability to hold a firearm seller liable for the criminal actions of a third party. 421 F.Supp.2d at 1290. Accordingly, plaintiffs' CUTPA claims do not satisfy the predicate exception to the PLCAA.

E. Plaintiffs Do Not Have Standing to Assert a CUTPA Claim

CUTPA only applies to damages based on an "ascertainable loss of money or property, real or personal," C.G.S. § 42-110g(a), and cannot be used as a basis to recover for personal injuries. In an attempt to avoid this limitation, plaintiffs purport to quote from C.G.S. § 42-110g, but omit a key part of the statute, without even using ellipses to indicate that a potion was omitted: "CUTPA's plain language allows 'any person' to proceed: CUTPA gives a right to sue to '[a]ny person who suffers any ascertainable loss as a result of the use or employment of a method, act or practice prohibited by [§] 42-110b[.]' Conn. Gen. Stat. § 42-110g." Opp'n at 41 (omitting the statutory language requiring that the loss at issue must be "of money or property, real or personal").

The cases plaintiffs cite for the proposition that CUTPA can be used as the basis to recover damages for personal injuries do not even remotely support their claim. In *Stearns & Wheeler, LLC v. Kowalsky Bros., Inc.*, 289 Conn. 1, 10, 955 A.2d 538, 543 (2008), the Connecticut Supreme

Court noted that it is "well established that in order to prevail on a CUTPA claim, the plaintiff must demonstrate that it has suffered 'any ascertainable loss of money or property,'" and that the "sum [plaintiff] paid to the estates pursuant to the settlement of the estates' wrongful death action is an ascertainable loss." In *Builes v. Kashinevsky*, this Court held that "altering medical records to avoid negligence claims is a proper claim under CUTPA," but dismissed plaintiff's CUTPA claim because she alleged "emotional distress as her only damages relating to the alleged alteration of the medical records. Any other injuries alleged related to the actual medical treatment, and not to the alleged alteration of the medical records, which is the basis for the CUTPA claim." No. CV095022520S, 2009 WL 3366265, at *4, *6 (Conn. Super. Sept. 15, 2009).

In *Abbhi v. AMI*, the court dismissed plaintiff's CUTPA claims based on the exclusivity provision of the Connecticut Product Liability Act ("CPLA") because it was for "wrongful death against product sellers and is related to the harm caused by a product." No. 960382195S, 1997 WL 325850, at *11 (Conn. Super. June 3, 1997). In addition, the product at issue in the *Abbhi* case, a Danish pastry, was not "defective," yet resulted in the death of plaintiff's decedent because it contained peanuts, to which she was allergic, but because the injury was caused by a product, the court held that the exclusivity provision of the CPLA barred a CUTPA claim. *Id.* at *1, *11. In the present case, plaintiffs' claims are in essence that the Bushmaster Rifle is "defective" in the hands of civilians because it is unreasonably dangerous.

Similarly, in *Osprey Properties, LLC v. Corning*, No. FBTCV156048525, 2015 WL 9694349, at *5, 7 (Conn. Super. Dec. 11, 2015), the court allowed a CUTPA claim to proceed where plaintiff claimed defendant engaged in a "deceptive and unscrupulous act in representing

that the underground storage tank was new, when, in fact, it is claimed to have been a used, damaged, repaired, or refurbished tank and the condition of the subject tank was concealed." Plaintiffs are not bringing a CUTPA claim against Camfour based on allegations that it made deceptive claims or misrepresentations regarding the Bushmaster Rifle, but rather because it was used to cause personal injuries to Natalie Hammond and the other plaintiffs' decedents.

Plaintiffs also lack standing to bring a CUTPA claim against Camfour because they are not consumers of the Bushmaster Rifle and are not customers or competitors of Camfour. The only case they rely on to claim that they nevertheless have standing is a 2001 decision from the Connecticut Supreme Court, Opp'n at 42-43, in which it dismissed an action against the firearms industry by the City of Bridgeport and its Mayor, and concluded that it was "unnecessary to consider whether CUTPA standing is confined to consumers, competitors and those in some business or commercial relationship with the defendants. *Ganim v. Smith & Wesson Corp.*, 258 Conn. 313, 372, 780 A.2d 98, 133 (2001).

In a subsequent decision, however, the Connecticut Supreme Court limited CUTPA standing to plaintiffs who are consumers or competitors of defendant, or in some other type of business relationship with defendant and their claim arises from that relationship. *Ventres v. Goodspeed Airport, LLC*, 275 Conn. 105, 157-58, 881 A.2d 937, 970 (2005) (rejecting the argument that a "CUTPA plaintiff is not required to allege any business relationship with the defendant"); *see also Pinette v. McLaughlin*, 96 Conn. App. 769, 775-78, 901 A.2d 1269, 1274-76 (2006); (relying on *Ventres* for the fact that "plaintiff must have at least some business relationship with the defendant in order to state a cause of action under CUTPA"). Plaintiffs' only

response to these binding decisions is that they "do not view them . . . as determinative in light of *Ganim*." Opp'n at 43. It is patently frivolous to argue that a prior decision not addressing an issue is a basis to disregard a later decision deciding that very issue.[11] Accordingly, plaintiffs do not have standing to pursue a CUTPA claim against Camfour.

III. CONCLUSION

For the above reasons, Camfour respectfully requests that this Court grant its motion to dismiss plaintiffs' First Amended Complaint against it in its entirety (Counts 2, 5, 8, 11, 14, 17, 20, 23, 26, 29, and 32), and grant such other relief as it deems just and proper.

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Respectfully submitted,

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[11] Yet another fatal defect in plaintiffs' CUTPA claims against Camfour is the fact that it legally sold the Bushmaster Rifle to Riverview, a federally licensed retail firearms dealer, through a transaction permitted under law administered by the Bureau of Alcohol, Tobacco, Firearms and Explosives. Am. Compl. ¶¶ 27, 30-36. As such, CUTPA does not apply to it. C.G.S. § 42-110c(a). Although Camfour raised this argument in connection with plaintiffs' CUTPA claims in its Motion to Dismiss, Camfour's Mem. at 14-15 n.6, plaintiffs made no effort to argue that it does not bar their claims.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Memorandum of Law in Further Support of the Motion to Dismiss was served on all counsel of record on February 16, 2016 by virtue of the State of Connecticut Judicial Branch's electronic filing system as well as by first class mail, U.S. postage prepaid to the following addresses:

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